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ON BEHALF OF
DEFENDERS OF WILDLIFE,
ENVIRONMENTAL DEFENSE,
AND
WORLD WILDLIFE FUND

BEFORE THE HOUSE RESOURCES COMMITTEE
HEARING ON *H.R. 3824, "Threatened and Endangered Species Recovery Act of 2005*."

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Mr. Chairman, Mr. Rahall, and Members of the Committee, I am Jamie Rappaport Clark, Executive Vice President of Defenders of Wildlife. Thank you for this opportunity to present the views of Defenders of Wildlife, Environmental Defense, and World Wildlife Fund on H.R. 3824, the Threatened and Endangered Species Recovery Act of 2005.

SUCCESS OF THE ENDANGERED SPECIES ACT

Prior to coming to Defenders of Wildlife, I worked for the federal government for almost 20 years, for both the Department of Defense and the Department of the Interior. I served as Director of the U.S. Fish and Wildlife Service from 1997 to 2001. Thus, I have seen the Endangered Species Act from different perspectives: that of an agency working to comply with the law; leading the agency charged, along with other federal agencies, states, and private landowners, with implementing the law; and now leading a conservation organization working to ensure that the law is fully implemented to conserve threatened and endangered plants and wildlife.

The common lesson I have drawn from all of these experiences is that the Endangered Species Act is one of our most farsighted and important conservation laws. For more than 30 years, the Endangered Species Act has sounded the alarm and saved wildlife that we humans have driven toward extinction. Today, we have wolves in Yellowstone, manatees in Florida, and sea otters in California, largely because of the Act. We can still see bald eagles in the lower 48 states and other magnificent creatures like the peregrine falcon, the American alligator, and California condors, largely because of the Act.

Indeed, there can be no denying that, with the Endangered Species Act's help, hundreds of species have been rescued from the catastrophic permanence of extinction. Many have seen their populations stabilized; some have actually seen their populations grow. Some have even benefited from comprehensive recovery and habitat conservation efforts to the point where they no longer need the protections of the Act.

In so many ways, Congress was prescient in the original construction of the Endangered Species Act. First, it crafted an Act that spoke specifically to the value − tangible and intangible − of conserving species for future generations, a key point sometimes lost in today's discussions.

Second, it addressed a problem that, at the time, was only just beginning to be understood: our looming extinction crisis. Currently there is little doubt left in the minds of professional biologists that Earth is faced with a mounting loss of species that threatens to rival the great mass extinctions of the geological record. Human activities have brought the Earth to the brink of this crisis. Many biologists today say that coming decades will see the loss of large numbers of species. These extinctions will alter not only biological diversity but also the evolutionary processes by which diversity is generated and maintained. Extinction is now proceeding one thousand times faster than the planet's historic rate.

Lastly, in passing the Act, Congress recognized another key fact that subsequent scientific understanding has only confirmed: the best way to protect species is to conserve their habitat. Today, loss of habitat is widely considered by scientists to be the primary cause of species endangerment and extinction.

Reduced to its core, the Act simply says the federal government must identify species threatened with extinction, identify habitat they need to survive, and help protect both accordingly. And it has worked. More than 1800 species currently protected by the Act are still with us; only 9 have been declared extinct. That's an astonishing success rate of more than 99 percent. It highlights that the first step toward recovering a species is to halt its decline.

With this record in mind, the benchmark against which to measure any proposal to change the Act is: Does it truly aid species conservation? If the answer is no, then we have failed.

H.R. 3824 UNDERMINES SPECIES RECOVERY

Mr. Chairman, you have been quite critical of the Act for not doing a better job of recovering species. The Act can be improved to better promote species recovery. Unfortunately, the bill you have introduced, H.R. 3824, is very disappointing. Instead of promoting recovery, H.R. 3824 would deal a tremendous setback to the recovery of threatened and endangered species.

H.R. 3824 undermines species recovery in several ways:

1. H.R. 3824 Fails to Protect Habitat Necessary For Species Recovery

H.R. 3824 establishes new recovery planning requirements that fail to ensure that habitat necessary for species recovery will be adequately protected or even considered in

determining, under section 7 of the Act, whether agency actions are likely to jeopardize the continued existence of threatened and endangered species. Thus, the bill's elimination of critical habitat without providing an improved way of protecting habitat essential to species recovery is a significant step backward, one that seriously undermines the purpose and intent of the law.

2. **H.R. 3824 Weakens the Obligation of Federal Agencies to Consult on Their Actions**

H.R. 3824 significantly weakens the substantive and procedural protections of section 7, generally considered the Act's most important and effective provision. For example, authorizing the Secretary to establish undefined "alternative procedures" for complying with section 7 could all but eliminate the current requirement that each federal agency consult with the Services on "any action" which is likely to harm endangered or threatened species. Further, H.R. 3824 creates several exemptions from the requirements of section 7 with respect to section 10 conservation plans and section 6 cooperative agreements. If federal agencies are not even required to engage in section 7 consultation, the bill makes it highly unlikely that they will do anything to promote species recovery.

3. H.R. 3824 Creates a De Facto Exemption From the Prohibition Against Take of Endangered Species

H.R. 3824 creates a broad and unwarranted de facto exemption from the current prohibition against take of an endangered species, contained in section 9 of the Act. Under H.R. 3824, a landowner can demand from the Secretary a written determination of whether a proposed activity will violate the take prohibition. If the Secretary fails to respond within 90 days, the bill provides that this shall be deemed a determination that the activity will not result in a take. Given the overburdened U.S. Fish and Wildlife Service, bogged down already in a morass of missed deadlines, it is easy to see how landowners will be able to secure de facto exemptions from the Act simply by waiting 91 days. Not only will this impede species recovery, it may result in piecemeal whittling away of important habitat, thereby accelerating species extinctions.

4. **H.R. 3824 Weakens Protection of Threatened Species**

H.R. 3824 undercuts prospects for recovery of threatened species as well as endangered species. Currently, section 4 of the Act requires regulations for threatened species that meet a highly protective standard: "necessary and advisable for the conservation" of the species. In other words, under current law, the Secretary is required to issue regulations that are necessary and advisable for the recovery of threatened species. H.R. 3824 eliminates any requirement whatsoever for regulations protecting threatened species. Moreover, even where the Secretary chooses to issue a regulation for a threatened species, H.R. 3824 eliminates the protective standard for such regulations.

5. **H.R. 3824 Weakens the Scientific Foundation for Endangered Species Decisions**

H.R. 3824 weakens the role of science in virtually every decision under the Act. Language requiring scientific information to comply with the Data Quality Act, to be empirical, peer-reviewed, and consistent with yet-to-be-written regulations before it can be considered the "best scientific data available" creates new procedural hurdles that threaten to exclude important scientific information such as population modeling and projections. Moreover, by failing to provide additional resources to comply with these new requirements, while maintaining and adding new deadlines, the bill virtually guarantees continued problems implementing the Act, further reducing the likelihood of species recovery.

6. H.R. 3824 Eliminates the Endangered Species Committee, the Act's Ultimate Safety Valve

H.R. 3824 eliminates the Cabinet-level Endangered Species Committee, established by Congress in 1978 to resolve truly irreconcilable conflicts between species conservation and development. The exemption provisions contained in section 7(e)-(n) have only rarely been used, testifying to the Act's flexibility for resolving conflicts. Nevertheless, the availability of the Endangered Species Committee, with its power to decide the ultimate fate of a species, has served as an important caution sign and an essential safety valve for conflict resolution. Eliminating it will only lead to further controversy over species conservation, rather than promoting species recovery.

7. **H.R. 3824 Requires Taxpayers to Pay Developers and Corporations Not to Violate the Law**

H.R. 3824 requires taxpayers to pay developers, corporations, and others the fair market value of any use of their property which is determined to violate the prohibition against take of an endangered species. Under the bill, developers are not required to first avail themselves of the Act's permit procedures under section 10 or, if a federal permit is involved, section 7 consultation. There is no requirement that the proposed activity be more than speculative and there is no limit on the number of times a developer can receive compensation for different proposed activities on his or her land. Thus, a developer might propose construction of a shopping center that will wipe out the habitat of an endangered species. Once the developer has been compensated for that use, he or she can propose an office park on the site and become entitled to compensation again. Instead of promoting species recovery, this provision creates a windfall for developers and corporations, requiring taxpayers to pay them over and over again for not killing or injuring endangered species.

IMPROVING SPECIES RECOVERY UNDER THE ACT

Mr. Chairman, your bill, H.R. 3824, will not make the Endangered Species Act do a better job at recovering species or improve the Act generally. Those goals are

achievable, however, if this Committee and the Congress will take a more productive path The following steps would improve the Act and ensure it works better for all stakeholders:

1. **Make species recovery the central focus of the Act**
2. **Properly protect and manage habitat that is needed for species recovery.**
3. **Enhance the science underlying endangered species conservation**
4. **Promote greater partnerships with the states**
5. **Provide incentives for conservation on private lands**
6. **Significantly increase funding for the Act**

Allow me to elaborate on each of these recommendations.

1. **Make species recovery the central focus of the Act**

The goal of the Act is to conserve species and the ecosystems upon which they depend. Section 3(3) of the Act defines conservation as "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary." In other words, the goal of the Act is to recover species. Implementing that goal has, however, been elusive.

We can make the ESA more effective for species and less onerous for landowners by ensuring that federal agencies do their part to promote species recovery. That means making sure that federal agencies are held to a high standard. If federal agencies are allowed to do things that make recovery less likely to occur, that push recovery off into the distant future, or that increase the cost of recovery, not only will species conservation suffer but the regulation of private landowners and others will almost certainly increase. Yet, federal agencies have been allowed to do exactly that.

Section 7 of the Act requires all federal agencies to consult with the Secretary of the Interior or Commerce to insure that their actions are not likely to jeopardize the continued existence of a listed species or adversely modify or destroy critical habitat. However, there is no statutory definition of jeopardy in current law. The only definition of jeopardy is regulatory and several courts have now found that definition invalid because it ignores the effects of an action on species recovery.

As federal agencies have ignored the effects of their actions on recovery of species, recovery has become an ever more distant goal. Consequently, the burden on private landowners to make up for what the federal agencies have not done has grown ever greater. If you really want to make the Act more effective at recovering species and less burdensome for private landowners, you can do that in one simple step: define jeopardy in the Act so that agencies insure that their actions will not make it less likely that a species will recover or significantly delay or increase the cost of recovery.

The goal of recovering species and, therefore, the definition of jeopardy, should be clear and unambiguous, without any qualifications such as "in the long-term." The addition of that phrase creates a serious risk that actions that have substantial adverse impacts on a species, but are of short duration, may not be seen as jeopardizing the continued existence of the species. By adopting an unambiguous definition of jeopardy, Congress will make clear that the central goal of the Act is to recover species and that section 7 consultations on federal agency actions must assess whether the actions are likely to impair recovery.

2. **Properly protect and manage habitat that is needed for species recovery**

Since species recovery is the central goal of the Act, the key step in achieving that goal is properly protecting and managing habitat necessary for species recovery. Accordingly, the Act should make clear that the habitat necessary for recovery needs to be identified and protected. The recovery plan is the logical and appropriate place to achieve this.

Section 4(f) of the Act requires the Secretary to develop and implement recovery plans. In order to make these plans truly effective in achieving species recovery, several changes should be made. First, there should be a deadline for developing recovery plans, perhaps 36 months from the date a species is listed. Second, specific areas of land or water that are of particular value to the conservation of the species and that are likely to require management or protection in order to accomplish the goals of the recovery plan should be identified. Third, there should be a clear requirement that, in considering whether a federal agency action is likely to jeopardize a listed species, the effects of the action on the habitat identified in the recovery plan must be considered.

Adoption of these measures, in combination with a clear statutory definition of jeopardy tied to a recovery standard, could eliminate the need for designation of critical habitat. If such measures were adopted, designated critical habitat should be treated as habitat necessary for recovery in the interim while habitat necessary for recovery is identified,.

3. **Enhance the science underlying species conservation**

There has been much debate over the quality of science underlying endangered species conservation decisions. Unfortunately, most of the proposals to address this, including H.R. 3824, have focused on restricting the types of data that can be considered or requiring time-consuming and cumbersome peer-review of virtually all conservation decisions. Rather than throwing more roadblocks in the way of consideration of the best available science, as the Act requires, you should increase the scientific capacity of the FWS and NMFS by creating for each of them a science advisory board modeled after the very successful science advisory board of the EPA. In that manner, rather than having Congress tell these agencies how they should do science – Congress can give them the benefit of useful input from scientifically qualified authorities.

4. Promote greater partnerships with the states

An important way to strengthen the Act is to take full advantage of the experience, expertise, and other strengths of state fish and wildlife and conservation agencies. The role of the states in the conservation of imperiled species should be strengthened and improved by fostering a stronger partnership between the states and the federal government. Currently, section 6 of the Act calls generally for cooperation between state and federal governments, but specifically addresses only the acquisition and management of land. Section 6 should be amended to specify that there be consultation with the State agencies concerned regarding revisions of the list of endangered species and threatened species, development and implementation of recovery plans, acquisition of lands, waters, or interests therein, issuance of permits, and measures to direct attention and resources to species before they become endangered or threatened.

As a further step in this direction, section 6 should be amended to replace the current system of "full authorities" and "limited authorities" cooperative agreements, with a simpler and more meaningful approach. States should have the flexibility to enter into cooperative agreements covering as many – or as few – species as the states choose. For each species covered by a proposed agreement, the state must demonstrate that it has an "adequate and active conservation program" that includes scientific resource management of such species and that is consistent with the purposes and policies of the Endangered Species Act. The allocation of federal funds to the states in support of their programs should be based on a somewhat shorter, but more meaningful set of criteria. First among these is the number of species to which the cooperative agreement applies. In addition, strong enforcement provisions, species recovery requirements, and adequate funding and staffing to implement state endangered species programs should be considered.

5. **Provide incentives for conservation on private lands**

Most private landowners are good stewards of their land. The Act should encourage this conduct by providing financial and regulatory incentives for conservation. Using existing programs, such as the Partners for Fish and Wildlife program and Farm Bill conservation programs to contribute to the conservation of endangered species should be encouraged. Providing landowners with safe-harbor assurances for their voluntary actions promoting species conservation should likewise be encouraged. Establishing a program to provide financial assistance for the implementation of conservation measures under safe harbor agreements would also encourage the broader use of such agreements.

6. Significantly increase funding for the Act

Everyone knows the U.S. Fish and Wildlife Service and NOAA are chronically under funded to carry out their responsibilities under the Endangered Species Act. Interestingly, it would not take much to change that. Devoting a mere fraction of the money the government spends on roads, mines, timber hauls and other "habitat-busting" projects instead to endangered species conservation would pay dramatic dividends, both

for species conservation and for the regulated community waiting for decisions on permits and plans.

CONCLUSION

When Congress adopted the Endangered Species Act more than thirty years ago, it made a commitment to future generations to protect and restore endangered species and their habitat. As this Committee considers changes to the Act, you should ask yourselves whether you are keeping that commitment. H.R. 3824 reneges on that commitment by undermining the Endangered Species Act's effectiveness at recovering threatened and endangered species. The changes I have outlined today would make the Act more effective in conserving species and, in so doing, keep the Endangered Species Act's commitment to our children, grandchildren, and generations to come.

Thank you for considering my testimony. I'll be happy to answer questions.